

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE HETZER, JR.,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 238362

Eaton Circuit Court

LC No. 01-020238-FH

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant James Lee Hetzer, Jr., appeals as of right from his jury conviction of operating under the influence of liquor (OUIL) – second offense, MCL 257.625(1)(a), (6)(b); carrying a concealed weapon (CCW), MCL 750.227; possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); felon in possession of a firearm, MCL 750.224f; operating on a suspended license – second offense, MCL 257.904; and two counts of felony-firearm, MCL 750.227b. He was sentenced two to ten years for CCW, two to eight years for possession of marijuana, two years for felony-firearm, two to ten years for felon in possession, and 365 days each for OUIL and operating on a suspended license. We affirm.

This case arises from a traffic stop in which defendant was pulled over while driving his mother's vehicle. Defendant admitted to driving without a license; while waiting for verification of defendant's identity, police officers found over a pound and a half of marijuana, along with a handgun, inside the vehicle's center console. At trial, the only disputed issues were whether defendant had possession of the handgun and whether he possessed the marijuana with intent to deliver.

On appeal, defendant first claims that counsel's *failure* to stipulate that defendant had an *unspecified* previous felony conviction (which is an element of the felon in possession of a firearm charge), constituted ineffective assistance. Because this Court denied defendant's motion to remand for a *Ginther*¹ hearing, our review is limited to the mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Ineffective

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

assistance of counsel is a constitutional issue that is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant was required to show that counsel's performance was below an objective standard of reasonableness under prevailing professional standards, and that, but for counsel's error, the outcome of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 644 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant was also required to show that the proceedings were "fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

Defendant asserts that defense counsel undermined his own trial strategy, along with defendant's credibility, by stipulating instead to highly prejudicial court documents that showed defendant had a previous conviction for a crime that he was also charged with at trial. Effective assistance is presumed, and a defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. To prove unreasonable performance, defendant must show that defense counsel failed to perform an essential duty, which, in turn, prejudiced defendant's case. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866 (1990).

Defendant did not overcome the presumption that counsel's stipulation might be considered sound trial strategy. By stipulating to the certified documents, defense counsel implemented a prophylactic rule designed to mitigate the prejudicial effect of a previous felony conviction as the predicate felony for a felony-firearm charge. See *United States v Mebust*, 857 F Supp 609, 613 (ND Ill, 1994); *People v Mayfield*, 221 Mich App 656; 562 NW2d 272 (1997). This Court will not second guess counsel regarding matters of trial strategy, even if the strategy failed. *Rodgers*, *supra* at 715.

Defendant also contends that he was harmed because counsel failed to request a limiting instruction emphasizing that the jury must give separate consideration to each charge and only consider the previous conviction as it related to the felony-firearm charge. There is no rule of per se reversal where all safeguards are not used. *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1988). Defense counsel stipulated to the use of court documents as evidence to prove the previous conviction; without the benefit of hindsight, this should be deemed sound trial strategy. *Id.* Although other safeguards were available to minimize prejudice to defendant, again, this Court does not substitute its judgment for defense counsel's regarding a matter of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Even if counsel's strategy was error, the evidence presented at trial was still sufficient to establish defendant's guilt. Defendant has therefore failed to sustain his burden to show that but for counsel's error, the outcome of the proceedings would have been different. *Strickland*, *supra* at 668; *Toma*, *supra* at 302.

Next, defendant argues that defense counsel's failure to object to the admission of uncharged bad acts and irrelevant prejudicial information constituted ineffective assistance of counsel. We disagree.

Defendant contends that counsel's inactions did not constitute sound trial strategy because they carried no real potential for increasing defendant's chances for an acquittal. Defendant also contends that defense counsel should have stipulated to the previous driving on a suspended license conviction to avoid the introduction of irrelevant prejudicial information.

Based on the record, it is not apparent that failure to stipulate to the previous driving on a suspended license conviction resulted from unsound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). Counsel may have concluded that it would benefit defendant if he appeared to be forthright and open in acknowledging his previous convictions. Consequently, without the benefit of hindsight, counsel's decision cannot be deemed unreasonable. *People v Rockey*, 237 Mich App 74, 78; 601 NW2d 887 (1999).

Defendant also argues that counsel failed to object to the arresting officer's reference to the paper license as evidence of defendant's previous driving on a suspended license. The paper license and the arresting officer's testimony were properly admitted to substantiate the theory that defendant used the car frequently, thereby connecting the gun found in the console to defendant. Defense counsel is not required to make futile objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, according to the record, defendant's driving record was never published, and the jury was never presented with a copy of defendant's driving record. Thus, any prejudice to defendant was minimal.

Next, defendant asserts that counsel was ineffective based on the failure to object to the prosecutor knowingly offering inadmissible evidence and to other acts of prosecutorial misconduct. To prove prosecutorial misconduct defendant must show that he was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The prosecutor asked defendant if he was a member of the gang "Vice Lords," but after defendant denied the accusation, the prosecutor proceeded with a different line of questioning. The prosecution may argue its theory of the case as it relates to defendant's involvement in drug dealing, and a possible connection to a gang is a reasonable prosecution theory. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999). Defense counsel may have refrained from objecting because he did not want to attract attention to the subject or counsel simply felt defendant's denial adequately dealt with the situation. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 271 (1995). Even if error, the evidence properly presented at trial was sufficient to establish defendant's guilt. *Id.*

Next, defendant asserts that unfair prejudice resulted when defense counsel failed to object to the prosecutor shifting the burden of proof by asking defendant to explain why he had not produced his mother to prove his defense theory. Defendant stated that his mother would have testified that he did not use guns. The prosecutor is allowed to question the defendant's credibility when defendant's testimony suggests that an absent "witness" would exculpate him. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). Even if this was an inappropriate line of questioning, it is not an unsound trial strategy to not object because the defense might not want to impress on the jury that defendant's mother was not testifying on her son's behalf. This Court will not second guess counsel regarding matters of trial strategy. See *Rodgers, supra* at 715.

Next, defendant asserts that unfair prejudice resulted when defense counsel failed to object to the prosecutor badgering defendant to tell the jury where he obtained his marijuana. Defendant testified that he bought his marijuana for \$500 and thereby opened the door to allow the prosecutor to question his credibility based on expert testimony that the marijuana was worth \$1,500. Defendant had already admitted that he bought the marijuana, and, having opened the door to cross-examination regarding the purchase, an objection would have been futile. *Snider, supra* at 425.

Finally, defendant argues that defense counsel was ineffective because counsel failed to challenge the allegations contained in the presentencing report that Michigan State police claimed defendant was affiliated with the “Vice Lords” gang. The statement contained in the presentencing report presented defendant’s position, as well as the contrary position of the police. The report is required to give the trial court all the background information about a defendant, both good and bad. *People v Martin*, 48 Mich App 437, 439; 210 NW2d 461 (1973), *aff’d* 393 Mich 145 (1974). Moreover, the trial court did not refer to the gang affiliation during the sentencing, and it is not apparent on the record that the trial court considered this information in imposing defendant’s sentence. Thus, there was no basis for relief.

Defendant has therefore failed to sustain his burden that counsel’s performance was below an objective standard of reasonableness under prevailing professional standards, and that, but for counsel’s error, the outcome of the proceedings would have been different. *Strickland*, *supra* at 694; *Toma*, *supra* at 302.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O’Connell